identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: FEB 09 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in business and a member of the professions holding an advanced degree. The petitioner seeks employment as a packaging engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability and/or a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as an alien of exceptional ability in business and/or as a member of the professions holding an advanced degree. Which of these two classifications better suits the petitioner is not relevant to this discussion. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 12, 2010. At the same time, the petitioner's spouse filed a separate petition. In a joint statement, both individuals stated:

> In the summer of 2007 we purchased 35 acres of land in [redacted] and during the last, financially difficult year we have invested $800,000 in local labour, materials and knowledge designing and building an eco-friendly home for our use, hopefully as a

> permanent residence. As well as the house build [*sic*] we have also owned, for a number of years, 4 weeks timeshare at a resort on [redacted].
>
> In addition I believe that both of us bring imaginative and distinctive skills to our respective areas of competence that would enhance any business where these could be utilised.

While substantial, the petitioner's investment in a house and surrounding real estate does not qualify the petitioner for an employment-based immigrant classification.

The petitioner stated that his career in packaging engineering began in 1982, and he worked for several employers since then, most recently with pharmaceutical packaging at [redacted] from 2003 to 2006; with [redacted]. from 2006 to 2008, and at [redacted] from 2008 to the time of filing. The petitioner offered the following description of his most recent work as a packaging development manager: "Working in sauces and food service packaging development I develop new packaging, pack formats and existing packaging that meet both internal and legislative requirements. I also identify new innovation and was awarded Innovation of the Month for March 2010."

The petitioner provided several quotations attributed to officials of various former employers. The petitioner did not submit first-hand evidence of these statements, such as signed letters. He merely incorporated quotations into his own introductory statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Furthermore, the quotations offer general endorsements of the petitioner's skill and professionalism as a packaging engineer, but do not explain why the petitioner so stands apart from his peers that an exemption from the job offer requirement would be in the national interest. For example, the petitioner quoted [redacted] as praising the petitioner's "'Can Do' attitude with his smart curiosity to challenge status quo, thinking out of the box and even crack paradigms no one thought of before." This vague statement provides no specific, verifiable information to show the petitioner's impact and influence on packaging design.

On June 10, 2010, the director issued a request for evidence, instructing the petitioner to "identify [her] proposed employment" and demonstrate that he meets all three prongs of the national interest test set forth in *NYSDOT*. In response, the petitioner stated:

> The area of industry I am looking for employment in is Packaging Research & Development but not to any specific area such as food, pharmaceutical, homecare or personal care as my experiences have seen me work in all of these. . . . For this reason I did not identify any single prospective employer in my original application as I would like to find an employer where I feel I can best utilise my skills. Ideally this would be in

> [redacted] where I have built a new house but if necessary I would work out of State for the right position of employment. . . .
>
> Communications I have had with various US recruitment consultants and company HR personnel have led me to the understanding that there is a shortage of suitably qualified people in the US packaging development industry and that people are moving around from one company to the next.

The petitioner submitted copies of electronic mail messages from corporate recruiters whom the petitioner had contacted in late 2009. The petitioner stated that these recruiters had no offers for the petitioner at the time, but "both indicate that there is a shortage" of professionals with the petitioner's skill set.

The electronic mail messages do not mention such a shortage. [redacted] stated that the company would consider "several candidates" before entertaining further inquiries. [redacted] stated: "I could forward your resume to our [redacted] office, if you are so inclined. Too bad your house isn't in MN. I have a couple of clients that would love your job history."

Even if the recruiters had mentioned a shortage of packaging engineers, the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. *NYSDOT* at 218. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

The petitioner identified some of his past projects, such as "new bottle material" for [redacted] and "[a]lteration to foiling machine lines" at [redacted] and provided figures for the annual savings that resulted from his innovations. Once again, the petitioner provided only his own statements rather than supporting documentary evidence. Also, the petitioner submitted nothing to provide context to these claims. The assertion that the petitioner developed new packaging is not remarkable on its face, given that he is a packaging engineer. Such development, therefore, would appear to be a basic component of his job duties, rather than evidence that he stands out from others in his field.

The petitioner stated that testimonials (possibly including those quoted earlier) are available on his profile at the business networking web site [redacted] For security reasons, the Department of Homeland Security does not permit USCIS computers into that site. Therefore, the AAO is unable to review the online testimonials. While USCIS reserves the right to verify the petitioner's evidence through appropriate inquiries, the petitioner, on whom the burden of proof rests, must submit the evidence that the petitioner wants USCIS to consider. He cannot simply tell USCIS or the AAO where to look for it. Also, as previously discussed, the quoted endorsements show that the petitioner has been a valued contributor to his various employers, but offer no information to show that the petitioner's influence has been so significant as to show that it would be in the national interest to

exempt him from the job offer/labor certification requirement that typically applies to qualified workers in his field.

The petitioner submitted documentation of his professional credentials, and indicated that he is one of only two people who hold the titles of [redacted]. The petitioner did not explain the significance of this distinction. The petitioner also noted that his house in [redacted] earned a "5 Stars Plus" Home Energy Rating Certificate. While the petitioner's environmental consciousness is praiseworthy, the construction of his personal residence is not relevant to his occupation, or to an employment-based immigrant classification. Furthermore, the energy efficiency of a single house has a negligible impact at a national level.

The director denied the petition on October 18, 2010, acknowledging the intrinsic merit of the petitioner's occupation, but finding that the petitioner failed to establish its national scope. The director also asserted that the petitioner did not meet the third prong of the *NYSDOT* national interest test simply by showing that he is a well-qualified and experienced packaging engineer. The director noted that USCIS does not grant the national interest waiver based on expertise alone.

On appeal, the petitioner states that he "would look for employ[ers] . . . that operate at least on a national basis but ideally on a global basis." The "national scope" prong of the *NYSDOT* decision pertains to the occupation, rather than the individual seeking immigration benefits, and it is conceivable that the field of packaging engineering can have national scope. Some forms of packaging achieve widespread use, and packaging innovations can facilitate greater product mobility (for instance by reducing weight, and therefore shipping costs, and by providing more protection to fragile goods during shipping). The AAO will therefore withdraw the director's finding that the petitioner's occupation lacks national scope.

With respect to his impact and influence on his field, the petitioner states: "I am sought after by businesses and the industry alike. Since filing my original application I was invited to, and accepted an invitation to be a judge for the [redacted] Awards. I have also accepted an invitation to be a Judge on the [redacted] Award later this year." The petitioner submits no evidence to support these claims. Furthermore, an applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner states: "I have had numerous ideas followed which highlights that while I bring benefit to my immediate employer my ideas have travelled throughout the industry and have brought similar benefits to other businesses." Once again, the petitioner offers no evidence to support or clarify this assertion. The petitioner provides no concrete, documented examples of packaging innovations through which he has influenced his industry. It is possible that the petitioner is, as he claims, a well-known and influential packaging engineer, but his own claims (however emphatic and however often repeated) cannot suffice in this regard.

If, as the petitioner claims, there is a shortage in his field and his services are in demand, then an intending employer can pursue labor certification on his behalf. In the end, the petition rests on little more than the petitioner's vague assertion that, given his experience and credentials, he will ultimately be a valued employee for some as-yet-unknown United States employer in an unspecified industry. This general statement of intent cannot form a coherent basis for a national interest waiver.

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability, or member of the professions holding an advanced degree, should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.